BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: PARAMOUNT SCAFFOLD, INC. 16631 South Avalon Boulevard Carson, California 90746 Employer	Docket Nos. 01-R3D1-4564 and 4566 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by Paramount Scaffold, Inc. [Employer] under submission, makes the following decision after reconsideration.

JURISDICTION

On April 20, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 2855 Main Street, Irvine, California (the site). On October 18, 2001, the Division issued two citations to Employer alleging serious violations of sections[1] 1644(a)(5)(A) [scaffold ties] and 1644(c)(5) [stacking scaffold frames], each with a proposed civil penalty of $2,700.

Employer filed a timely appeal contesting the existence and classification of the alleged violations and the reasonableness of the proposed penalties.

On February 28, 2003, a hearing was held before Barbara J. Ferguson, Administrative Law Judge (ALJ), in Anaheim, California. Regis Guerin, Attorney, represented Employer. Denise Johnson, Staff Counsel, represented the Division.

On April 4, 2003, the ALJ issued a decision denying Employer's appeal.

[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

On May 2, 2003, Employer filed a petition for reconsideration. The Division filed an answer to the petition on June 6, 2003. The Board took Employer's petition under submission on June 23, 2003.

BACKGROUND

Employer is a scaffold company that was hired by the plastering sub-contractor, Smith Plastering [Smith], to construct a scaffold at the site. On April 20, 2001, the Division's compliance office, Roy McGinnis [McGinnis], inspected the scaffold and on October 8, 2001 issued citations to Employer alleging that Employer was in serious violation of section 1644(a)(5)(A) for failure to tie the scaffold to the building at the 12-foot elevation as required by that section, and also in serious violation of section 1644(c)(5) for failure to stack the metal scaffold frames one on top of the other at the upper scaffold levels. At the time of the inspection the scaffold reached a height of approximately 80 feet. McGinnis classified both violations as serious based on a substantial probability that, should an accident occur as a result of each of the violations, the likely result would be death or serious injury.

Docket No. 01-R3D1-4564
Citation 1, Section 1644(a)(5)(A), Serious

EVIDENCE

McGinnis testified that he measured the dimensions of the scaffold frames and determined that the least base dimension of the frame was three feet. McGinnis photographed the platform of the scaffold and determined that it was 12 feet in height and that it therefore was four times the least base dimension thus requiring, according to section 1644(a)(5)(A), the installation of the first row of ties into the building at the 12-foot elevation. McGinnis testified that he saw no ties securing the scaffold to the building at the 12-foot elevation. He also testified that he could not tell if the scaffold had ever been tied in at that level because the brown coat plaster had been applied at that point. The final coat of plaster,[2] however, had not yet been completed. He did acknowledge that ties did exist at the 20-foot elevation.

Dan Johnson [Johnson], who testified on behalf of Employer, said that he purchased Paramount Scaffold in 1988. He had no personal knowledge of ties having been installed at the 12-foot elevation. He testified: "I didn't see the job site, ***ever***." [Emphasis added] He explained: "My position is that Citation 1 here is based on Mr. McGinnis's ***observations*** when he went out there but are not representative of the situation." [Emphasis added] Johnson went on to speculate that "***Either*** it could have been tied in earlier and those ties were cut

[2] The final or finish coat is a decorative color coat, according to Johnson, head of the company.

or the base was widened[3] during the time it was necessary when they were doing the erection." [Emphasis added]

Richard Meehan [Meehan] testified on behalf of Employer. He said he was a registered civil engineer. He testified that there was no violation of section 1644(a)(5)(A) because the four to one height to least base ratio refers to free standing scaffolds, scaffolds standing alone with no ties. He went on to say that when McGinnis observed the scaffold it was tied in at the 20-foot elevation, so therefore there was no violation because this was not a free standing scaffold.

ISSUE

Did the Division establish a serious violation of section 1644(a)(5)(A)?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

Employer was cited for a serious violation of section 1644(a)(5)(A) which provides:

> Metal scaffolds shall be securely tied to the building or structure by means of a double looped No. 12 iron wire, or single looped No. 10 iron wire or equivalent at intervals not to exceed 30 feet horizontally and subject to the following:
> (A) Ties shall be required at the free ends of the scaffold when the height of the scaffold platform exceeds 3 times the least base dimension.[4] The remaining ties of the first row shall be required when the height of the scaffold platform is four times the least base dimensions.

The citation specifically alleged:

> On April 20, 2001 the scaffold erection company failed to ensure that the first row of ties were at four times the least base dimension of three (3) feet. The first row ties on scaffolding, with vertical uprights separated by three (3) feet between the inboard (next to exterior wall) upright and the outside vertical upright, were at 20 foot elevation instead of the required 12 foot elevation.

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[3] Johnson spelled out that "*…it's typical to add a second frame, to clamp it on for a few minutes while you're erecting the scaffolding. Then those frames are usually removed once you're tied in.*"

[4] The citation issued to Employer contained the insertion of an additional inaccurate second sentence which read: "*The remaining ties of the first row shall be required when the height of the scaffold platform exceeds 3 times the least base dimension.*" This inaccurate recitation of the Safety Order was neither raised at hearing nor in Employer's petition for reconsideration. The Board's review of the record discloses no application of this inaccuracy to the facts of this case and it is treated as a clerical error and is therefore a nullity.

Employer's petition for reconsideration first argues that "... the Division had the burden to *prove* that there were no ties at the 12-foot elevation, *as originally erected by Paramount.*" [Italics in original] It asserts that the ALJ's decision "relies on the speculation of ... McGinnis that ties were *never* installed at the 12-foot elevation." [Italics added] In support of this assertion Employer points to the fact that McGinnis failed to poke holes in the plaster in search of the inserts to the ties.

McGinnis's testimony established that on April 20, 2001 when he inspected the scaffold at the site there were no ties present at the 12-foot elevation of the scaffold. Employer does not dispute this; instead, it postures that McGinnis was obligated to *prove* that ties were never originally installed at the 12 foot elevation as they may have been removed at any time after installation. The Board rejects this contention.

The language of section 1644(a)(5)(A) is clear and unambiguous, it does not contemplate compliance merely by an initial installation of the required ties at the ends of the first row. In this case, it requires the continuous tie-in of the first row of ties at the 12-foot elevation. McGinnis measured the least base dimension and found it to be three feet. At the time he made this three-foot measurement the scaffold reached a height of approximately 80 feet, which was beyond the 12 feet that the Safety Order's calculation requires for this first row of ties to be installed. The 12-foot threshold is arrived at by multiplying the three-foot least base dimension by four. Because the product of that calculation is 12 feet, the Safety Order's express requirement is to install the remaining ties of the first row when the height of the scaffold exceeds four times its least base dimension, as in this case.

Employer next contends that the burden of proof was improperly placed on Employer and not on the Division. Employer offered no evidence that it had, in fact, installed ties at the 12-foot elevation. Instead, it speculated that they may have been installed earlier and cut or not installed because of some alternative concept of temporarily widening the base of the scaffold.[5]

The Board disagrees that the burden of proof was shifted to Employer in this case. The Division has the burden to prove, by a preponderance of the evidence, the applicability and violation of section 1644(a)(5)(A).[6] Where an element of an alleged violation must be proven and the employer does not present any evidence disproving that element, the Division need only present evidence sufficient to establish that it is more likely than not that the violation existed.[7] Here, the Division presented evidence sufficient to establish the violation through McGinnis's testimony regarding his measurement of the least base dimension of the scaffold and his observation that ties were not located at

[5] See footnote 3.
[6] See *Howard J. White, Inc.,* Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).
[7] See *Petrolite Corporation,* Cal/OSHA App. 93-2083, Decision After Reconsideration (Mar. 3, 1998).

the 12-foot elevation where the ties were required to secure the scaffold to the building. Employer's witnesses failed to refute this.

Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer.[8] Thus, the burden of producing evidence that ties were installed at the 12-foot elevation shifted to Employer. Johnson's testimony was speculative as to whether or not ties had ever been installed at the 12-foot elevation. McGinnis's testimony is credited based on his personal observation that there were no ties at the 12-foot elevation. Even if Johnson was correct that the ties had once been installed, the absence of those ties on April 20, 2001 is found to be violative of section 1644(a)(5)(A).

Also, Meehan's testimony was conclusionary and devoid of any support for his assertion that there was no violation of section 1644(a)(5)(A) because that section applies only to "free standing" scaffolds. The Board finds no merit in Meehan's position that the Safety Order is inapplicable because it applies only to "free standing" scaffolds. Section 1644(a)(5)(A) begins with the stated requirement that "(m)etal scaffolds *shall be securely tied to the building or structure* … ." [Emphasis added]

The issue of the serious classification was not challenged by Employer at hearing nor was it raised in its petition for reconsideration.[9] Accordingly, based upon the above analysis, the Board finds that the Division has established a serious violation of section 1644(a)(5)(A).

Docket No. 01-R3D1-4566
Citation 3, Section 1644(c)(5), Serious

EVIDENCE

McGinnis testified as to Employer's violation of the requirement of section 1644(c)(5) to place the scaffold frames one on top of the other. He explained the violation and demonstrated it by reference to the Division's exhibit 2h, a photograph which he testified he took and testified that it was an accurate description of what he observed on April 20, 2001. He said that the scaffold frames at issue were placed one on top of the other with the inboard, or leg closet to the building, placed on top of the next lower inboard vertical rise, and the outboard vertical rise placed on top of the outboard vertical rise of the next lower frame. He continued by saying that this configuration of frame stacking "continues like this on up until it became impossible." This

[8] 1 Witkin, Cal. Evidence (4th ed. 2000) Buren of Proof and Presumptions, § 2; see also Evid. Code section 550(a).
[9] The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which reconsideration is sought other than those set forth in the petition for reconsiderations. Labor Code section 6618.

"impossibility" was the result of what was described as a decorative foam "pop out" which protruded about three feet from the building at the uppermost floors. The scaffold was then cantilevered out from the building such that the inboard vertical rise of the scaffold frame leg was placed atop the outboard vertical rise of the next lower frame and the outboard leg of the frame was supported by the cantilever or truss which was attached to the next lower frame as a diagonal brace such that it horizontally extended the scaffold platform.

McGinnis testified that the cantilever or truss arrangement was technically a violation but he considered the construct to be safe. He nonetheless issued a citation for violation of section 1644(c)(5). Meehan testified that the use of the cantilever or truss on a situation like this is common practice and was constructed in a safe manner. Johnson likewise testified that the scaffold was safe.

ISSUE

Did the Division establish a serious violation of section 1644(c)(5)?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

Employer was cited for a serious violation of section 1644(c)(5) which provides:

> Panels or frames [of tubular welded metal frame scaffolds] shall be placed one on top of the other with coupling or stacking pins to provide proper vertical alignment of the legs.
> NOTE: Where an intervening ledge prevents the vertical stacking of legs, the ledge may be used as a base provided that an equally safe installation is obtained.

The citation specifically alleged that:

> As of April 20, 2001 the scaffold erection company had failed to place tubular welded scaffold frames on top of the other, lower tubular scaffold frames. The topmost section of scaffolding with a working platform was placed directly on top of the next lower section, which also had a working platform. This lower scaffold frame (second frame down) was not placed directly on top of a lower scaffold frame. The inboard vertical upright (immediately adjacent to the building exterior wall) of this lower frame was placed on the outboard vertical upright of the frame beneath it (third scaffold frame down) and the outboard vertical upright (away from exterior building wall) was connected to an outrigger whose

outboard end was braced diagonally to provide additional support to the outboard end of the outrigger. The plans and specifications of the outrigger and scaffolding structure were not prepared by a Civil Engineer currently registered in California.

The testimony of McGinnis and the Division's Exhibits described the violation as occurring at the two topmost platforms of the scaffold (at the 7th and 8th floors) which were not aligned vertically as required by the Safety Order. Rather, they extended outward from the building by use of a cantilever or truss arrangement wherein the inboard vertical rise of the 7th floor frame was placed on top of the outboard vertical rise of the frame below it and the outboard vertical rise of the 7th floor frame was placed on top of the cantilever or bracket; this was repeated for the top floor scaffold.

Employer's petition for reconsideration argues that there is no language in the regulation itself stating that the "inboard vertical rise of the metal frame must be placed on top of another, and the outboard vertical rise rests on the outboard part below," as McGinnis testified was the requirement of section 1644(c)(5). We think, however, that the language of the regulation, "*to provide proper vertical alignment,"* conveys the appropriate basis for an interpretation of section 1644(c)(5) as requiring stacking of upper levels of scaffolding which shall be done to maintain a vertical alignment.

Employer next argues that the ALJ's "Decision failed to address critical testimony of Roy McGinnis wherein he admitted that the Citations [Nos. 2 and 3] were 'technical violations,' and admitted that the scaffold was safely erected. Moreover, Mr. McGinnis admitted that there was *no other way to erect the scaffold directly adjacent to the parapet which would have been compliant with § 1644(c)(5)."* [Emphasis in original] It should be noted that a technical violation is still a violation. As to the safe construction of the scaffold, both sides opined that the scaffold construction was safe. The Board needn't reach the issue of whether the construction of the scaffold was safe because the violation charged required stacking which provides proper vertical alignment. The Board declines to elevate the opinions of individuals over that of the Standards Board who enacted the regulation for which Employer was cited, as authorized by statute.[10]

As to the inability to erect the scaffold in accordance with the Safety Order, McGinnis's opinion that *"there was no other way to erect the scaffold … which would have been compliant with § 1644(c)(5)"* is belied by Johnson's testimony that there *was* another method but that involved considerable expense.[11]

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[10] Labor Code section 142.4 authorizes the Standards Board to adopt, amend or repeal safety and health standards as provided in the Administrative Procedures Act (Gov. Code § 11340 *et seq.*)

[11] Johnson was asked "*So was there any other was to comply with the letter of the law?"* He testified that *"Yes, there was … where you set double rows of scaffolding all the way around the project."* He indicated

Cost effectiveness isn't a criterion that the Appeals Board can use in determining whether a statutory or regulatory requirement has been complied with. Once the Standards Board has promulgated a Safety Order requiring certain employee protection, in the absence of defective or imperfect language in the Safety Order, the Appeals Board in bound to sustain it as drafted and to determine whether there was a violation.[12] Employer is required to comply with the Safety Order.[13] If it feels that it should not be required to comply with section 1644(c)(5), it should apply for a variance from the Occupational Safety and Health Standards Board or it can seek to have the Safety Order repealed or amended.[14] This Board will not substitute its judgment for that of the Standards Board.[15]

The ALJ found that a serious violation of section 1644(c)(5) existed and found that the evidence, including specifically Division Exhibit 2h, supports a finding that the scaffolding frames were not stacked pursuant to the requirements of section 1644(c)(5). The Board will not disturb the ALJ's findings in the absence of compelling evidence to the contrary,[16] and the Board finds no such contrary evidence. Accordingly, The Board finds that the Division has established a serious violation of section 1644(c)(5).

DECISION AFTER RECONSIDERATION

Docket No. 01-R3D1-4564

A serious violation of section 1644(a)(5)(A) is established and a civil penalty of $2,700 is assessed.

Docket No. 01-R3D1-4566

A serious violation of section 1644(c)(5) is established and a civil penalty of $2,700 is assessed.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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that it would double the cost of the scaffolding *"and you wouldn't have won the project nor would any one else who designed it that way."*

[12] *Southern California Edison Company,* Cal/OSHA App. 75-415, Decision After Reconsideration (May 5, 1976*); Kaiser Aluminum and Chemical Corporation*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985).

[13] Labor Code section 6407.

[14] Labor Code sections 142.3—142.4; *Hooker Industries, Inc.,* Cal/OSHA App. 77-525, Decision After Reconsideration (Feb. 24, 1982).

[15] *Howe Industries, Inc.,* Cal/OSHA App. 76-1168, Decision After Reconsideration (Oct. 17, 1980).

[16] See *Lamb* v. *Workmen's Compensation Appeals Board* (1974) 11 Cal.3d 274.